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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MAXIMILIAN KLEIN, et al., on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

META PLATFORMS, INC., a Delaware
Corporation,

Defendant.

Case No. 3:20-cv-08570-JD

**DEFENDANT META PLATFORMS,
INC.'S REPLY IN SUPPORT OF
MOTION TO EXCLUDE EXPERT
TESTIMONY AND OPINIONS OF
MARKUS JAKOBSSON**

Hearing Date: To Be Determined
Time: To Be Determined
Judge: Hon. James Donato

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1 Jakobsson's testimony that an app he never analyzed engaged in [REDACTED] or
 2 [REDACTED] could not possibly help the jury to decide the claims in this *antitrust* case.
 3 Jakobsson's testimony is unquestionably non-technical, legal opinion that is irrelevant to this case
 4 and should be excluded.

5 The testimony is concededly irrelevant—Advertisers never assert that the competitive
 6 effects of Meta's FBR App in any way turn on whether it employed [REDACTED] or
 7 [REDACTED]. And while Advertisers contend that Jakobsson's testimony will help the jury
 8 [REDACTED] [REDACTED] Opp. 1, 4, it is plain from their opposition that this is
 9 pretense. After saying Jakobsson will not offer legal testimony, *id.* at 4, Advertisers repeatedly
 10 justify the "importance" of his testimony by invoking his opinions associating Meta with
 11 [REDACTED] [REDACTED] [REDACTED] and [REDACTED]
 12 [REDACTED] *id.* at 5-8.

13 Jakobsson's testimony is also unquestionably nontechnical. Start with the obvious:
 14 Jakobsson never personally reviewed the FBR App, its code, or the data it collected. Nowhere do
 15 Advertisers explain how Jakobsson could have employed his claimed technical expertise to arrive
 16 at his opinions about the FBR App, when he never analyzed it.

17 Instead, Advertisers argue that Jakobsson interprets and explains technical documents. *See*
 18 Opp. 6. To be sure, throughout his reports, Jakobsson purports to "explain" emails sent to and from
 19 Meta's CEO and other executives. *See, e.g.,* Ex. 1, Jakobsson Rep. ¶¶64-84, 118-126, 135-138;
 20 Ex. 2, Jakobsson Reb. ¶¶62-68, 75, 97-98, 101-105.¹ But his explanations are *neither* technical nor
 21 the result of any analysis or methodology—they are merely attorney argument repackaged as
 22 expert opinion. Advertisers seek to use Jakobsson as a human highlighter to improperly put an
 23 expert gloss on business documents. Advertisers concede, as they must, that Jakobsson offers
 24 opinions "near identical" to their counsel's interrogatory responses, Opp. 9, and they do not dispute
 25 that counsel drafted those responses prior to Jakobsson's involvement in the case, *see* Mot. 3. Their
 26 argument that Jakobsson's opinions are simply "in line with Advertisers' substantive positions"
 27 and comply with Rule 26, Opp. 4, 10, misses the point. Advertisers repeatedly say Jakobsson's

28 ¹ Unless otherwise noted, emphasis is added and "Ex." citations reference exhibits 1-4 to the Gringer Decl. filed with Meta's *Daubert* motion, Dkt. 880.

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1 raison d'être in this case is giving "technical" explanations, but his explanations cannot be
 2 technical expert opinions within the meaning of Rule 702 (or Rule 26) if they are obviously copied
 3 verbatim from counsel's prior work. Indeed, the opposition demonstrates exactly how Jakobsson
 4 will rehash record documents and testimony for the sole purpose of amplifying the arguments
 5 counsel will make. *See, e.g.*, Opp. 8 (Jakobsson "[REDACTED]" what documents "[REDACTED]").
 6 Advertisers claim this is [REDACTED] because Meta's witnesses include engineers while Advertisers
 7 have "[REDACTED]" to "[REDACTED]"
 8 of the FBR App. *Id.* 4, 9. But Jakobsson, who is interpreting the record second-hand, is not a
 9 "counterbalance" to fact witnesses, testifying to first-hand knowledge. Advertisers are of course
 10 free to cross-examine those witnesses. And they were free to have a technical expert (Jakobsson
 11 or someone else) actually conduct a technical analysis of the FBR App if they thought that analysis
 12 could somehow be relevant to their claims. What they are not free to do is practice ventriloquism
 13 to offer their own spin on what Meta, its executives, and its employees intended, believed, or
 14 understood via Jakobsson. *See* Mot. 7-8.

15 The Court should grant Meta's motion and exclude Jakobsson's opinions and testimony in
 16 full. At minimum, the Court should exclude any of Jakobsson's opinions commenting on the
 17 [REDACTED] of Meta's conduct [REDACTED] as improper
 18 legal conclusions.

19 **I. ARGUMENT**

20 **A. Advertisers Concede That Jakobsson Copied and Pasted Counsel's Argument**

21 Advertisers concede that substantial portions of Jakobsson's expert report are "near
 22 identical," Opp. 9, to the lawyer-written contentions set forth in Advertiser's interrogatory
 23 responses. Their only meaningful rebuttal is that it is permissible for lawyers to "be involved in
 24 the preparation of an expert report," *id.* at 10. That excuse falls short of justifying Jakobsson's
 25 wholesale copying of counsel's arguments. *See* Mot. 3-6.²

26
 27
 28 ² Advertisers also misleadingly claim that Meta takes contradictory positions in its Motion for Summary Judgment. *See* Opp. 9. Not so. Meta challenges the untimely disclosure of an entirely new trade secret theory, under Rule 37 (not Rule 702) as prohibited by this Court's Standing Order.

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1 Unlike the attorney involvement in the cases Advertisers cite, Jakobsson’s parroting of the
 2 lawyers’ arguments stretches far beyond “editorial assistance,” *NetFuel, Inc. v. Cisco Sys., Inc.*,
 3 2020 WL 1274985, at *3 (N.D. Cal. Mar. 17, 2020) (cited at Opp. 10), or lawyer-drafted
 4 “background information” that is “qualified by statements such as ‘I am informed that’”
 5 *Optronix Techs., Inc. v. Ningbo Sunny Elec. Co.*, 20 F.4th 466, 477 (9th Cir. 2021) (cited at
 6 Opp. 10). Jakobsson’s parroted opinions are not “qualified” and are not “background
 7 information”—in fact they concern the FBR App’s method of collecting data, which according to
 8 Advertisers is “the very reason expert testimony is required.” *Holley v. Gilead Scis. Inc.*, 2023 WL
 9 2440237, at *3 (N.D. Cal. Mar. 9, 2023). Throughout Jakobsson’s opening report, paragraphs
 10 purporting to provide *Jakobsson’s* technical opinion about the FBR App are actually identical (e.g.,
 11 Mot. 3-4) or, as Advertisers concede, “near identical” (Opp. 9; *see, e.g.*, Mot. 4-5) to counsel’s
 12 interrogatory responses and briefs drafted before Jakobsson’s involvement, evincing no
 13 “substantive assistance” from Jakobsson. *NetFuel*, 2020 WL 1274985, at *3; *see Collins v. United*
 14 *States*, 2023 WL 8113259, at *3 (C.D. Cal. Nov. 22, 2023) (Rule 26 does not allow for an attorney
 15 to “simply draft[] the report without prior substantive input from [an] expert”). Advertisers and
 16 Jakobsson say he wrote those paragraphs, and that they reflect his opinions, Opp. 10, but the “fairly
 17 minor” changes he made speak for themselves. *Numatics, Inc. v. Balluff, Inc.*, 66 F. Supp. 3d 934,
 18 945 (E.D. Mich. 2014) (excluding report “ghost-written by [the attorneys]” that was
 19 “indistinguishable down to the punctuation”); *see also Holley*, 2023 WL 2440237, at *2 (excluding
 20 reports where “undeniable substantial similarities” between materials “prepared with assistance
 21 from [] counsel ... demonstrate that counsel’s participation so exceeded the bounds of legitimate
 22 ‘assistance’ as to negate the possibility that [the experts] actually prepared [their] own report”).
 23 Regardless of whether Jakobsson agrees with counsel’s arguments or whether the report reflects
 24 his views, *see* Opp. 10, he is not providing his own technical opinion, reflecting his own
 25 independent assessment of the FBR App, but instead is regurgitating Advertisers’ counsel’s
 26 arguments with the imprimatur of a neutral expert.

27 Advertisers suggest that Jakobsson’s parroting is limited to only a handful of paragraphs
 28 in his reports, Opp. 4, but Meta’s motion merely provided a handful of examples. There are many

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more. *E.g.*, compare Ex. 3, Interrog. 24 Resp. at 935, with Ex. 1, Jakobsson Rep. ¶¶105-106. For example, Advertisers filed a discovery letter on May 31, 2023, that cites and describes a series of nine documents. *See* Dkt. 735. Jakobsson cites the same documents in the same order for the same points in his opening report. Ex. 1, Jakobsson Rep. ¶¶64-65, 68-71, 75, 77-85, 87. In any event, the examples in Meta’s motion illustrate that Jakobsson’s core opinions about the FBR App’s “technical” methods are not expert opinions at all—they “simply vouch for [the lawyers’] version of the facts.” *Open Text S.A. v. Box, Inc.*, No. 13-cv-4910-JD, Dkt. 469 at 1 (N.D. Cal. Jan. 26, 2015); *see* Mot. 3-6. Accordingly, Jakobsson’s opening report, and the summaries of it in his rebuttal, Ex. 2, Jakobsson Reb. ¶¶35-43, should be excluded.

B. Advertisers Concede That Jakobsson’s Speculative Testimony On Corporate Intent Is Inadmissible and Unhelpful to the Jury

Advertisers also fail to meaningfully oppose Meta’s argument that Jakobsson cannot offer his impressions of why Meta developed the FBR App, what Meta’s employees thought about the FBR App, or how Meta intended to use the data collected. *See* Mot. 7-8; Ex. 1, Jakobsson Rep. ¶¶31, 61-71, 76-77, 118, 125; Ex. 2, Jakobsson Reb. ¶¶44, 46, 49, 51, 54, 61-76, 87, 89-93, 97-99, 108, 110, 121-159. Their argument that Jakobsson will “[REDACTED]” of Meta employees, and “[REDACTED]” Opp. 7-8, concedes that Jakobsson impermissibly offers testimony on factual questions the jury can evaluate based on the testimony of employees (including cross examination) and the contemporaneous documents themselves. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 2018 WL 6511146, at *3 (N.D. Cal. Dec. 11, 2018) (courts routinely exclude testimony “about why any person ... took or did not take a particular action or made or did not make a particular decision.”). Likewise, Advertisers do not contest that Jakobsson cannot know about and is not qualified to opine on Meta’s corporate intent or its employees’ states of mind with respect to the FBR App and the data it collected. *See United States ex rel. Jordan v. Northrop Grumman Corp.*, 2003 WL 27366315, at *8 (C.D. Cal. Mar. 10, 2003) (excluding technical expert’s opinion as to defendant’s mental state).

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1 Instead, Advertisers contend that there is nothing wrong with Jakobsson undertaking a
 2 “technical evaluation” of evidence. Opp. 10-11. But even their opposition makes clear that
 3 Jakobsson’s “technical evaluation” is nothing more than a thinly disguised attempt to apply the
 4 veneer of expertise to non-technical facts, usurping the jury’s role. Advertisers claim there is “not
 5 a serious basis” to exclude paragraph 107 of his report, ignoring that it is copied verbatim from
 6 Advertisers’ interrogatory responses, *compare* Opp. 10, with Mot. at 5-6, and it rehashes a non-
 7 technical employee evaluation to speculate about how Meta used and intended to use the data the
 8 FBR App collected. *See* Ex. 1, Jakobsson Rep. ¶107; Mot. 8. “Such unhelpful restatements of the
 9 facts as the expert sees them are inadmissible.” *Pelican Int’l, Inc. v. Hobie Cat Co.*, 655 F. Supp.
 10 3d 1002, 1030 (S.D. Cal. 2023) (cleaned up) (excluding expert opinions as to “intent, motive, or
 11 state of mind” and recitations of “long non-technical restatements of the facts”). Dressing up
 12 documents like an employee evaluation as “technical” because they involve “an engineer,” Opp.
 13 10-11, does not change that Jakobsson is merely offering lay interpretations of evidence that the
 14 jury can evaluate for itself. *Oracle*, 2018 WL 6511146, at *3.

15 The Court should exclude Jakobsson’s opinions and testimony on intent, motive, and states
 16 of mind reflected in paragraphs 31, 37, 107, 116-125, 130-131, and 135-138 of his opening report
 17 and paragraphs 36-37, 44-46, 48-49, 51, 53-54, 61-77, 87, 89-93, 97-106, and 108-159 of his
 18 rebuttal report.

19 **C. Advertisers Concede That Jakobsson Will Offer Improper And Irrelevant**
 20 **Legal Conclusions**

21 Unable to plausibly argue that Jakobsson should be permitted to testify about the FBR
 22 App’s legality, Advertisers equivocate and claim Jakobsson’s “[REDACTED]
 23 [REDACTED].” Opp. 4. But this is no assurance when the rest of their brief asserts Jakobsson
 24 “will testify [about] [REDACTED],” *id.* at 5, will “walk the jury and the
 25 Court through ... [REDACTED],” *id.* at 7,
 26 “[REDACTED]
 27 [REDACTED]” *id.*, and “[REDACTED]
 28 [REDACTED]” *id.* at 8. Advertisers cannot

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1 characterize such testimony as the reflection of industry knowledge, *see* Opp. 11 (claiming
 2 Jakobsson is “an undeniable cybercrime expert”), when his reports provide no support for his
 3 conclusions other than say-so. Indeed, nowhere does Jakobsson set forth an industry definition or
 4 standard for “██████████,” “██████████,” or “██████████.” *See Koger v. Costco*
 5 *Wholesale Corp.*, 2023 WL 8188842, at *3-4 (N.D. Cal. Nov. 27, 2023) (Donato, J.) (excluding
 6 expert’s legal conclusion couched as an opinion on industry standards because expert’s “references
 7 to industry standards” were “not adequately supported”). And Jakobsson’s supposed industry
 8 definition of “██████████” is plucked right out of the ██████████ *See* Mot. 9; *Diamond Resorts*
 9 *U.S. Collection Dev., LLC v. Pandora Mkt., LLC*, 2023 WL 9659943, at *17-18 (C.D. Cal. July
 10 26, 2023) (“[T]he best way to determine whether opinion testimony ... merely states legal
 11 conclusions, is to determine whether the terms used by a witness have a separate, distinct and
 12 specialized meaning in the law.”).

13 Jakobsson’s legal conclusions are not only inadmissible expert testimony, but also a
 14 diversion that will derail the jury’s resolution of the legal questions that *do* matter for Advertisers’
 15 antitrust claims. *See In re Capacitors Antitrust Litig.*, 2021 WL 5407452, at *5 (N.D. Cal. Nov.
 16 18, 2021) (Donato, J.) (excluding expert’s legal conclusions under FRE 402 and 403); *Daubert v.*
 17 *Merrell Dow Pharms.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995) (expert opinion must “speak[]
 18 clearly and directly to an issue in dispute in the case”). Advertisers cannot sweep this problem
 19 away by asserting that Jakobsson’s legal conclusions are “undeniably fair.” Opp. 11. Under their
 20 own theory of exclusionary conduct, Advertisers must show that the FBR App had an
 21 ““anticompetitive effect,”” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990 (9th Cir. 2020) (quoting
 22 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001)), but they fail to dispute that
 23 the FBR App’s competitive effects *do not* turn on whether it employed “██████████” or otherwise
 24 purported ██████████. *See* Mot. 10-11; Opp. 9-10. Instead, as Dr. Tilman Klumpp has
 25 explained, the alleged anticompetitive effect of the FBR App turns on his opinion that the data
 26 obtained “was a trade secret.” Reply in Supp. of Mot. to Exclude Klumpp at pp. 3-5 (filed
 27 concurrently). That opinion is itself inadmissible legal analysis, but whatever its propriety, it does
 28 not depend on proving “██████████” or “██████████” *Id.* So far from being “fair,” Opp. 11, it is

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undeniably *prejudicial* for Jakobsson to offer inflammatory and legally charged comparisons of Meta's conduct to that of [REDACTED] and [REDACTED] when that testimony is concededly irrelevant.

The Court should not permit Jakobsson to offer his inflammatory (and irrelevant) legal opinion that Meta has committed a [REDACTED] by using the FBR for an act he repeatedly labels [REDACTED]. See Ex. 1, Jakobsson Rep. ¶¶27, 36-37; see also *id.* ¶¶27, 36-37, 112, 116, 132; Ex. 2, Jakobsson Reb. ¶¶29, 45-46, 48, 50, 52, 61, 91, 96, 109, 115, 149-152.

II. CONCLUSION

The Court should exclude the testimony and opinions of Markus Jakobsson in full.

Dated: February 12, 2025

Respectfully submitted,

By: /s/ Sonal N. Mehta
SONAL N. MEHTA

Attorney for Defendant Meta Platforms, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February, 2025, I electronically transmitted the public redacted version of the foregoing document to the Clerk's Office using the CM/ECF System and caused the version of the foregoing document filed under seal to be transmitted to counsel of record by email.

By: /s/ Sonal N. Mehta
Sonal N. Mehta